110-212

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 966.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

LEWIS CLEPHANE.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED SEPTEMBER 22, 1883.

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1 *Declaration, Filed July 6, 1878.*

In the Supreme Court of the District of Columbia, the sixth day of July, A. D. 1878.

THE DISTRICT OF COLUMBIA, Plaintiff,
vs.
LEWIS CLEPHANE, Defendant.
} At law. No. 19,781.

The plaintiff sues the defendant for that whereas heretofore, to wit, on the nineteenth day of October, A. D. one thousand eight hundred and seventy-two, at the city of Washington, in the District of Columbia, by a certain contract then and there made between Henry D. Cooke, Alexander R. Shepherd, James A. Magruder, A. B. Mullet, and Samuel P. Brown, constituting and composing the late Board of Public Works of said District of Columbia, of the first part, and the said defendant of the second part, which said contract, sealed with the seal of the defendant, said plaintiff now
2 brings here into court, the date whereof is the same day and yenr aforesid, it was witnessed that said dufendant, for the considerations therein mentioned, did thereby covenant, promise, and agree to and with Henry D. Cooke, Alexander R. Shepherd, James A. Magruder, A. B. Mullet and Samuel P. Brown, constituting and composing the late Board of Public Works of said District of Columbia, that said defendant would well and truly, in a good, sufficient, and workmanlike manner, and according to the specifications contained in said contract, execute certain work therein mentioned, to wit: To lay and put down the pavement known as and called the "Miller Wood Pavement" on the carriageway of Twelfth street northwest, from the south side of F street northwest to P street northwest. Also to terrace, furnish and lay Seneca stone steps, grade, set curbs, lay foot pavements, and construct water
3 services and sewer laterals on Twelfth street northwest between M and P streets northwest, all in the city of Washington. And that said defendant did thereby further covenant, promise, and agree as follows: "Ninth. It is further agreed that if at any time during the period of three years from the completion of the work to be done under this contract, any part or parts thereof shall become defective from imperfect or improper material or construction, and in the opinion of the said party of the first part require repair, the said party of the second part will, on being notified thereof, immediately commence and complete the same to the satisfaction of the said party of the first part, and in case of a failure or neglect of the said party so to do, the same shall be done under the directions and orders of the said party of the first part at the cost and expense of the said party of the second part."

4 And although said Henry D. Cooke, Alexander R. Shepherd, James A. Magruder, A. B. Mullett, and Samuel P. Brown, and their successors, constituting and composing the said

Board of Public Works, and, as Commissioners of said District, William Dennison, John H. Ketcham, and Seth L. Phelps, under act of June 20, 1874, and successors of said Board of Public Works, have always since the making of said contract, well and truly performed, fulfilled, and kept all things in said contract contained on the part of said Board of Public Works to be performed, fulfilled, and kept, yet the defendant did not well and truly, in a good, sufficient, and workmanlike manner, or in accordance with the specifications contained in said contract, execute the work therein mentioned, and within three years from its completion a part of the same, to wit, on Twelfth street, F and N streets northwest, became defective from imperfect and improper material and construction.

5 And for that, whereas by virtue of an act of the Congress of the United States, approved June 20th, 1874, and entitled "An act for the government of the District of Columbia, and for other purposes," William Dennison, John H. Ketcham, Seth L. Phelps were authorized, as commissioners of the said District, to exercise all the power and authority, at the date of said act, lawfully vested in the Governor or Board of Public Works of said District, and they thereby became the successors of the said Board within the meaning of the said contract, and writing obligatory, and were authorized to act in all matters concerning the same, as the said Board might have acted.

That by virtue of the authority so in them vested, the said William Dennison, John H. Ketcham and Seth L. Phelps, commissioners as aforesaid, on or about the eighth day of July, 1875, notified the defendant, Lewis Clephane, in writing, of the defective work hereinbefore mentioned, and called upon the said defend-

6 ant to repair the same according to his said contract, and in default of his so doing, of their intention to cause the said work to be repaired at the cost of the defendant.

But the said defendant refused and neglected to repair the said defective work, and the said William Dennison, John H. Ketcham, and Seth L. Phelps, commissoners as aforesaid, were compelled to have the same repaired by other persons, of which the said defendant was duly notified, at a cost of forty thousand five hundred and seventeen dollars ($40,517), to the plaintiff, which sum the plaintiff has duly demanded of the defendant, and the said defendant refused to pay the said amount according to his contract, to the damage of the plaintiff of forty thousand five hundred and seventeen dollars ($40,517).

And so the plaintiff says that said defendant, although often reqeusted so to do, has not kept said covevants so by him made as aforesaid, but has broken the same, and to keep the same

7 with said plaintiff has heretofore wholly neglected and refused, and still does neglect and refuse, to the damage of said plaintiff of forty thousand five hundred and seventeen dollars ($40,517).

Wherefore the plaintiff brings this suit and claims forty thousand five hundred and seventeen dollars ($40,517), with interest from July 8, 1875, together with costs.

A. G. RIDDLE,
FRANCIS MILLER,
Attorneys for Plaintiff.

Notice to Plead.

The defendant is to plead hereto on or before the first special term of the court, occurring twenty days after service hereof, otherwise judgment.

A. G. RIDDLE,
FRANCIS MILLER,
Attorneys for Plaintiff.

8 *Summons issued July 6, 1878.*

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA, Plaintiff,
vs.
LEWIS CLEPHANE, Defendant. } At Law. No. 19,781.

The President of the United States, to the defendant, Greeting:

You are hereby commanded to appear in this court, on the first day of its special term occurring twenty days after service of this writ on you, to answer the plaintiff's suit and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness: D. K. CARTTER,
Chief Justice.
R. J. MEIGS, *Clerk,*
[SEAL.] By J. R. YOUNG, *Ass't Clerk.*

NOTE.—The special terms of the court commence on the first Tuesday of every month, except August, in which month there is no term of the court.

9 *Acknowledgment of service, July 6, 1878.*

Service acknowledged for all the defendants.

WILLIAM A. COOK,
Sol. for Def't.

July 6, 1878.

Demurrer, filed September 2, 1878.

In the Supreme Court of the District of Columbia.

DISTRICT OF COLUMBIA.
vs.
LEWIS CLEPHANE. } Law. No. 19781.

The defendant says that the declaration is bad in substance.

NOTE.—Among the points to be presented on the demurrer are the following:

1st. The District of Columbia has no power to sue as claimed and set forth in the declaration, on either the contract or bond mentioned in the declaration.

2d. The contract and bond referred to in said declaration
10 was with Henry D. Cooke, Alexander R. Shepherd, James A. Magruder, A. B. Mullett, and Samuel P. Brown, constituting and comprising the Board of Public Works of the District of Columbia, as created and organized under the 37th section of an act entitled "An act to provide a government for the District of Columbia," approved February 21st, 1871, and neither said act nor said contract provided for any successors, or for the opinion, judgment, or orders of any of other persons than the members of said Board of Public Works, or the organization created and existing under that name, and the defendant cannot be held or bound otherwise than as provided in said contract.

3rd. The said District of Columbia is neither the certain attorney, successor, or assign of the said Cooke, Shepherd, Magruder, Mullett, and Brown, within the meaning of the instrument of writing sued on, and has no legal rights or interest therein which can be set up or maintained by it.

WILLIAM A. COOK,
Att'y for Defendant.

11 *Joinder in Demurrer. Filed Sep.* 19, 1878.

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA
vs.
LEWIS CLEPHANE. } At Law. No. 19781.

The plaintiff says that the declaration is good in substance.

RIDDLE AND MILLER,
Attorneys for Pl't'ff.

Note of Issue. Filed Sep. 19, 1878.

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA
vs.
LEWIS CLEPHANE. } At Law. No. 19781.

Last pleading filed Sept. 19, '78.

A. G. RIDDLE, AND
FRANCIS MILLER,
Att'ys for Pl't'ff.
WM. A. COOK,
Att'y for Def't.

12 *Proceedings before Circuit Court.*

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District,

commencing the fourth Monday, the 24th day of January, A. D. 1881.

MONDAY, *January* 24, 1881.

By order of Arthur MacArthur, justice, one of the justices of said supreme court, presiding. The court is opened by proclamation of the marshal pursuant to rule of court.

* * * *

SATURDAY, *February* 19, 1881.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

* * * * *

THE DISTRICT OF COLUMBIA, Pl'ff,
vs.
LEWIS CLEPHANE, Def't. } At Law. No. 19781.

On hearing the defendant's demurrer to the plaintiff's declaration, it is considered that said demurrer be and the same is hereby
13 overruled, and leave granted the defendant to plead over within twenty days.

14 *Pleas Filed April* 7, 1881.

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA
vs.
LEWIS CLEPHANE. } At Law. No. 19781.

The defendants, for pleas to the plaintiff's declaration, say:

1. That they never were indebted as alleged.

2. That they never made the covenant as alleged in the said declaration.

3. The defendants deny the alleged breach of the said supposed covenant, and say that they did not commit the same, or any part thereof.

4. That the plaintiff has not been damaged by the alleged breach of the supposed covenant as set forth in the said declaration.

5. That the paper set forth and referred to as a contract, in
15 the said declaration, was made without any authority of law, and in disregard of the provisions of the 37th section of the act of Congress of the United States, approved February 21, 1871, entitled "An act to provide a government for the District of Columbia, which provided among other things, that the Board of Public Works created by said section of said act, should have no power to make contracts to bind said District to the payment of any sums of money, except in pursuance of appropriations made by law, and not until such appropriations shall have been made." And the said defendants in fact say that no appropriation had been made or existed at the date of the execution of said supposed contract, for the

work therein specified and described, either by the Congress of the United States or the District of Columbia.

6. That the bond mentioned in the said declaration is void and cannot be enforced against these defendants, because it was made without any authority of law, and in disregard of the pro-
16 visions of the 37th section of said act of Congress, entitled "An act to provide a government for the District of Columbia; and to secure the performance of a contract not authorized by law, and made in disregard thereof, and when no appropriation for the work contracted for existed, either on the part of the United States or the District of Columbia."

7. That by the section of the act of Congress of the United States ,entitled, "An act to provide a government for the District of Columbia," approved February 21, 1871, it was provided that the executive power in and over the District of Columbia, should be vested in a Governor, to be appointed by the President, by and with the advice and consent of the Senate, to hold his office for four years, and by the 37th section of said act it is provided that a board of Public Works should exist in said District, of which the Governor should be president, with four persons to be appointed
17 by the President of the United States, by and with the advice and consent of the Senate, one of whom should be a civil engineer, to hold their office for the term of four years, unless sooner removed by the President of the United States, and that one Henry D. Cooke was appointed Governor on or about 28th February, 1871, and continued as such only until 13 September, 1873, when he was succeeded by Alexander R. Shepherd, and that the members of the Board of Public Works were appointed as required by law on or about March, 1871, and consisted of Alexander R. Shepherd, James A. Magruder, A. B. Mullet and Samuel P. Brown, who remained in office until June 24th, 1874, except Mullett and Brown who resigned before that date, and were succeeded by Cluss and Blake. And that the provision of said contract as set forth in said declaration, viz: Ninth. "It is further agreed that if at any time during the period of three years from the completion of the work to be
18 done under this contract any part or parts thereof shall become defective from imperfect or improper material or construction, and in the opinion of the said party of the first part require repair, the said party of the second part will, on being notified thereof, immediately commence and complete the same to the satisfaction of the said party of the first part, and in case of failure or neglect of the said party so to do, the same shall be done under the directions and orders of the said party of the first part at the cost and expense of the said party of the second part." Only provided for repairs if they should be required in the opinion of the party of the first part, as named and existing in said contract, and did not in any way provide or stipulate for the making of the repairs, if in the opinion of any other

person or persons required, and that the said parties of the first part, as named and existing in the said contract, never required
19 any repairs, nor pretended that the work done by the defendants was not done in a workmanlike manner, and that the opinion that it was defective and imperfect, if existing at all, was the opinion of persons not parties to the contract, but other and different persons not authorized by the contract to declare the work defective, and to require it to be repaired, and such opinions and requirements are in no respect obligatory upon the defendants.

8. That the writing obligatory referred to in said declaration was given in connection with the contract mentioned in said declaration to secure the enforcement of the provisions of said contract, as between the parties thereto, viz., Henry D. Cooke, Alexander R. Shepherd, James A. Magruder, Adolph Cluss, and Samuel P. Brown, constituting and composing the Board of Public Works, and provided for the conditional payment of the amount mentioned
20 therein to the said parties constituting the Board of Public Works, and to its certain attorney, successor, or assigns, and not to any other body, or person or persons, and not to the District of Columbia; and that the District of Columbia is neither the certain attorney, successor, or assigns of the Board of Public Works, and that in point of fact, it has no certain attorney, successor, or assigns.

9. That it is not true, and is expressly denied that the work and material mentioned in said contract, and referred to in said writing obligatory, were not good, and was not done in a good, sufficient, and workmanlike manner; but, on the contrary, they say the material was selected and approved in advance by the agents of the said Board of Public Works, and the work was done in a good, sufficient, and workmanlike manner, and that it was done under the supervision, direction, and control of the Board of Public
21 Works named in said contract and its regularly constituted and appointed officers, and approved and accepted by said Board without any objection or complaint, and that the said Board of Public Works and all others entitled to the benefit of said contract or bond are estopped thereby from maintaining this suit.

10. That it is not true that William Dennison, John H. Ketcham, and Seth S. Phelps, Commissioners of the District of Columbia, under and by virtue of an act of Congress, entitled "An act for the government of the District of Columbia, and for other purposes," approved June 29, 1874, became the successors of said Board, with power to entertain, express, or have any opinion with regard either to the material used, or the work done by the defendants mentioned in the declaration, or as to the construction thereof, so as to be empowered to declare the same defective and insufficient, and
22 to require repairs thereto, and they deny that, in the exercise of any such power, or assumed power, they gave notice to the defendants in writing of the alleged defective work, and called upon the defendants to repair the same, and that, in default

of them doing so, it would be repaired at their cost, and that, after the exercise of any such power or pretended notice, the work was repaired by others at the cost of $40,517.

11. They further say that the contract or instrument in writing in the nature of a contract, signed by them, stipulated and provided that the defendants should be paid by the Board of Public Works, in lawful money of the United States, and that said Board wholly and entirely neglected and refused to so pay the defendants, and violated in this respect contract as the work progressed, and when it was completed, and they aver that having failed to perform the contract on its [—], the said Board cannot, nor can its
23 successors, maintain said action for an illeged violation of the condition of said bond.

12. They further say that by reason of the violations of the contract on the part of the District of Columbia, and its neglect and failure to pay the defendant, Lewis Clephane, in lawful money of the United States, he became subjected to great and heavy losses in the execution of said work, not only by loss of time, but by expenses in procuring money and otherwise, and was greatly injured and damaged to the extent of not less than $40,517, and the defendants claim the right to recover said damages and set them off against the alleged damages claimed by the plaintiff.

W. A. COOK & C. C. COLE,
Attorneys for Defendant.

24 *Joinder in Issue, Filed April* 30, 1881.

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA, *vs.* LEWIS CLEPHANE. } At Law. No. 19781.

The plaintiff joins issue upon each and every one of the defendant's pleas in this cause plead.

A. G. RIDDLE,
Attorney for Plaintiff.

25 *Defendant's Amended Pleas. Filed Feb.* 28, 1882.

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA *vs.* LEWIS CLEPHANE. } At Law. No. 19781.

The defendant for pleas to the plaintiff's declaration, says:

1. That he never was indebted as alleged.
2. That he never made the covenant as alleged in the said declaration.
3. The defendant denies the alleged breach of the said supposed

covenant, and says that he did not commit the same or any part thereof.

4. That the plaintiff has not been damaged by the alleged breach of the supposed covenant, as set forth in the said declaration.

5. That the paper set forth and referred to as a contract, in
26 the said declaration, was made without any authority of law and in disregard of the provisions of the 37th section of the act of Congress of the United States, approved February 21, 1871, entitled "An act to provide a government for the District of Columbia, which provided among other things, that the Board of Public Works created by said section of said act, should have no power to make contracts to bind said District to the payment of any sums of money, except in pursuance of appropriations made by law, and not until such appropriations shall have been made," and the said defendants in fact say that no appropriation had been made or existed at the date of the execution of said supposed contract, for the work therein specified and described, either by the Congress of the United States or the district of Columbia.

7. That by the section of the act of Congress of the United
27 States entitled "An act to provide a government for the District of Columbia," approved February 21, 1871, it was provided that the executive power in and over the District of Columbia should be vested in a Governor, to be appointed by the President, by and with the advice and consent of the Senate, to hold his office for four years, and by the 37th section of said act it is provided that a Board of Public Works should exist in said District, of which the Governor should be president, with four persons to be appointed by the President of the United States, by and with the advice and consent of the Senate, one of whom should be a civil engineer, to hold his office for the term of four years, unless sooner removed by the President of the United States, and that one Henry D. Cooke was appointed governor on or about the 28th Feb-
28 ruary, 1871, and continued as such only until the 13th September, 1873, when he was succeeded by Alexander P. Shepherd, and that the members of the Board of Public Works were appointed, as required by law, on or about March, 1871, and consisted of Alexander R. Shepherd, James A. Magruder, A. B. Mullett, and Samuel P. Brown, who remained in office until June 24th, 1874, except Mullett and Brown, who resigned before that time and were succeeded by Cluss and Blake. And that the provision in said contract as set forth in said declaration, viz., ninth, "it is further agreed, that if at any time during the period of three years from the completion of the work to be done under this contract, any part or parts thereof, shall become defective from imperfect or improper material or construction, and in the opinion of the said party of the first part require repair, the said party of the
29 second part will, on being notified thereof, immediately commence and complete the same to the satisfaction of the said party of the first part, and in case of failure or neglect

of the said party so to do, the same shall be done under the direction and orders of the said party of the first part at the cost and expense of the said party of the second part," only provided for repairs if they should be required in the opinion of the party of the first part, as named and existing in said contract, and did not, in any way, provide or stipulate for the making of the repairs, if, in the opinion of any other person or persons required, and that the said parties of the first part, as named and existing in said contract never required any repairs, nor pretended that the work done by the defendants was not done in a workmanlike manner, and that the opinion that it was defective and imperfect, if existing at
30 all, was the opinion of persons not parties to the contract but other and different persons not authorized by the contract to declare the work defective, and to require it to be repaired, and such opinion and requirement are in no respect obligatory upon the defendants.

9. That it is not true and is expressly denied that the work and material mentioned in said contract were not good, and was not done in a good, sufficient, and workmanlike manner; but, on the contrary, they say the material was selected and approved in advance by the agents of the said Board of Public Works, and the work was done in a good, sufficient, and workmanlike manner, and that it was done under the supervision, direction, and control of the Board of Public Works named in said contract and its regularly constituted and appointed officers, and approved and accepted
31 by said Board without any objection or complaint, and that the said Board of Public Works, and all others entitled to the benefit of said contract or bond, are estopped thereby from maintaing this suit.

10. That it is not true that William Dennison, John H. Ketchum, and Seth S. Phelps, Commissioners of the District of Columbia, under and by virtue of an act of Congress, entitled "An act for the Government of the District of Columbia and for other purposes," approved June 20, 1874, because the successors of said Board, with power to entertain, express, or have any opinion with regard either to the material used or the work done by the defendants mentioned in the declaration, or as to the construction thereof, so as to be empowered to declare the same defective and insufficient, and to require repairs thereto, and they deny that in the exercise of any such power,
32 or assumed power they gave notice to the defendants, in writing, of the alleged defective work, and called upon the defendants to repair the same, and that in default of their doing so it would be repaired at their cost, and that after the exercise for any such power or pretended notice, the work was repaired by others at the cost of $———

11. They further say that the contract, or instrument in writing in the nature of a contract, signed by them, stiputated and provided that the defendants should be paid by the Board of Public Works, in lawful money of the United States, and that said Board wholly

and entirely neglected and refused to so pay the defendants, and violated in this respect the contract as the work progressed, and they aver that having failed to perform the contract on its
33 part, the said Board cannot nor can its successor maintain said action for an alleged violation of said contract.

12. They further say that by reason of the violations of the contract on the part of the District of Columbia, and its neglect and failure to pay the defendant, Clephane, in lawful money of the United States, he became subjected to great and heavy losses in the execution of said work, not only by loss of time, but by expenses in procuring money and otherwise, and was greatly injured and damaged to the extent of not less than $41,000, and the defendants claim the right to recover said damages against the alleged damages claimed by the plaintiff.

W. A. COOK & C. C. COOK,
Attorneys for Defendant.

That said defendant fully performed all things in said contract to be done and performed by him.

The said Board of Public Works and said Commissioners
34 of said District have not always, since the working of said contract, well and truly performed, fulfilled and kept all things in said contract contained in said contract on the part of the Board of Public Works to be performed, fulfilled and kept.

That a part of said work, to wit, on 12th street, between F and and N streets northwest, did not within three years from its completion become defective from imperfect and improper material and construction.

That the said Commissioners did not notify said defendant to repair said work as alleged.

That said Commissioners did not repair said work as alleged.

W. F. MATTINGLY,
COOK & COLE,
Attorneys for Defendant.

Agreement to the Filing of Amended Pleas.

We consent to filing of these amended pleas.

A. G. RIDDLE,
FRANCIS MILLER,
Attorneys for D. C.

35 *Joinder of Issue Upon Pleas, Filed Feb.* 28, 1882.

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA
vs.
LEWIS CLEPHANE. } At Law. No. 19781.

The plaintiff joins issue with the defendant upon its pleas this day filed.

A. G. RIDDLE,
FRANCIS MILLER,
Atty's for Plaintiff.

35½ *Circuit Court Proceedings.*

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing the fourth Monday, the 23d of January, A. D. 1882.

MONDAY, *January 23d*, 1882.

By order of Arthur MacArthur, justice, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal, pursuant to rule of court.

* * * * * * *

TUESDAY, *February 28th*, 1882.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

* * * * * * *

THE DISTRICT OF COLUMBIA, Plff.,
vs.
LEWIS CLEPHANE, Def't. } At Law. No. 19781. Cal. 36.

Now comes here as well the plaintiff by its attorneys, Messrs. Riddle & Miller, as the defendant, by its attorney, Mr. Cook, and a jury of good and lawful men of this District, to wit: George Seitz, Leonard C. Bailey, Henry Ottinger, William S. Graham,
36 James Barnett, Benjamin Ryan, John W. Jett, Francis Aldrich, Andrew Twine, Charles T. Smith, Charles Ludington, and John Ransom, who being duly sworn to try the issue above joined, after hearing the evidence, on their oath say they find said in favor of the defendant. Therefore it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day, and recover against the plaintiff the costs of his defence, taxed at $ ——, and have execution thereof.

37 *Motion for New Trial on Bills of Exceptions, Filed Mar.* 1, 1882.

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA
vs.
LEWIS CLEPHANE. } At Law. No. 19781.

And now comes the plaintiff and filed this, its motion for a new trial on bills of exceptions, taken to the rulings of the justice presiding at the trial and in his instructions to the jury.

A. G. RIDDLE,
Atty. for Plaintiff.

38 *Bill of Exceptions, Filed April 29, 1882.*

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA
vs.
LEWIS CLEPHANE. } At Law. No. 19781.

Plaintiff's Bill of Exceptions.

Be it remembered, that at the trial of this case the plaintiff, to maintain and prove the issues upon its part joined, offered and read in evidence the contract known as No. 571, made between the late Board of Public Works of the District of Columbia, acting for and on behalf of the District, and the defendant; the due execution of which by the parties thereto was admitted by the defendant, as also the persons who, at the time of the execution of the con-
39 tract, were members of and composed the said Board of Public Works; the said contract being in the words and figures following: This contract, made and concluded this nineteenth day of October, in the year one thousand eight hundred and seventy-two, by and between Henry D. Cooke, Alexander R. Shepherd, James A. Magruder, A. B. Mullett, and S. P. Brown, constituting and composing the Board of Public Works of the District of Columbia of the first part, and Lewis Clephane, of Washington, D. C., of the second part, witnesseth:

First. That the said party of the second part has agreed, and by these presents doth agree, with the said party of the first part, for the consideration hereinafter mentioned and contained, and under the penalty expressed in a bond bearing even date with
40 these presents, and hereunto annexed, to furnish at his own proper cost and expense all the necessary materials and labor, and in a good, firm, and substantial manner to lay and put down the pavement known as and called the "Miller Wood Pavement," on the carriageway of Twelfth street N. W., from the south side of F street N. W. to P street N. W., in the city of Washington, D. C.; also, to park, terrace, and furnish and set such Seneca stone steps as he may be required to furnish and set by the chief engineer of the said party of the first part on said Twelfth street street N. W., between M and P streets N. W.; also, to grade, set the curbstones, lay and put down the brick foot pavements, and construct the water services and sewer laterals on said Twelfth street N. W., between said M and P streets N. W., the wooden blocks of said Miller pavement, to be treated after the
41 process known as and called the Burnettizing process, in accordance with the specifications following for burnettizing, and the said Miller pavement to be laid and put down in accordance with letters-patent No. 76227, dated March 31, 1868, on file in the U. S. Patent Office, and the said grading, curbing, brick paving, sewer laterals, and water services, parking, terracing, and setting up stone steps, to be done and completed under the directions

of said chief engineer, in accordance with the specifications following, to wit:

Specifications for Burnettizing.

The wood is drawn into large wrought-iron cylinders capable of sustaining a hydrostatic pressure of 200 lbs. per square inch. The cylinders are about seventy to eighty feet in length, and built
42 of the best wrought-iron. The cylinder heads are of gun-metal, and are screwed on air-tight by using rubber inside the rims, and by bolts and nuts. The air is then pumped out of the cylinder by an air pump; a vacuum of 27 half inches, as noted by gauge and cylinder, is held for about an hour and a half. The chloride of zinc is then introduced from below, which rushes up and fills the cylinder and pores of the wood. Hydraulic pressure is then applied, an average pressure of 150 lbs. to the square inch is held from two to four hours, varied with the size and condition of the wood to be burnettized.

Green lumber will take solution more rapidly than dry—the pores being open and the albumen of the wood soluble. Three hours under pressure is sufficient for four and five inch lumber; four
43 hours for seven and eight inch square timber. The solution of chloride of zinc should stand at 9 degrees Twoddle test.

The solution should be made long enough for use to have the acid become neutral. In case of doubt about strength of solution, and proper application, the inspector is required to reduce the specimens of lumber to ashes, and submit them to chemical analysis as directed by Prof. John Torrey, or Prof. Henry. Any work done by the contractors, not subject to the above formula and tests, whenever required, or when so subjected, and not found of the standard, will be rejected.

BOARD OF PUBLIC WORKS,
DISTRICT OF COLUMBIA.

Specifications for grading streets, &c.

The base of excavation, including the sidewalks will be —— feet wide. The road-bed proper will be —— feet between the
44 curbs, and must be graded to —— inches below the level of the curb at the center of the street, and —— inches below the level of curb at the side, leaving the road-bed a fall of —— inches from the center to the sides.

The material obtained in grading will be deposited where directed by the Chief Engineer of the Board of Public Works, and no sand, gravel, cobblestones, curb, bricks, or pipe obtained in the excavation, or found on the premises, shall be considered the property of the party of the second part, nor used by him or them, except as hereinafter prescribed.

The filling must be done in layers not exceeding eighteen inches in thickness, so that the same may be well compressed by the driving of the carts over it.

The excavation will include only the road-bed, sidewalks,
45 and the slope from them to the building line, according to the grade to be given by the Chief Engineer of the Board of Public Works. No more grading must be commenced at any one time than one square, except by permission of the chief engineer, and the filling must be brought up to grade established and shown by plans before the work can be accepted as completed.

In the allowance for hauling, the length of the haul over two hundred feet, and the amount of material hauled, will be determined on an average basis by the Chief Engineer of the Board of Public Works, whose decision shall be final. All materials, such as curb, cobble, brick, etc., removed from the premises, and deposited under the directions of the chief engineer, will be paid for at the rates for hauling established by the Board of Public
46 Works. All measurements will be made in the excavation only.

BOARD OF PUBLIC WORKS,
DISTRICT OF COLUMBIA.

Specifications for Setting Curb-stones.

The curb-stones will be of such quality as may be ordered by the Board.

The trench will be dug to such depth as may be required for the curb, and sufficiently wide to allow the earth to be rammed under and adjacent to the stone. The curbs will be laid on the level and grade given by the engineer; the joints to be closed, and the outer and inner surfaces to be set even, and in a continuous plane surface. Where the ground is clay or loam the ditch will be filled with gravel, the first filling to be not more than three inches above the bottom of the stone, which will be well rammed by
47 rammers or bars, so as to give the curb a solid bearing under its entire length. Other layers will then be rammed in the ditch to within 10 inches of the top of the curb, the layers for each ramming to be not more than 4 inches deep.

BOARD OF PUBLIC WORKS,
DISTRICT OF COLUMBIA.

Specifications for Brick Foot Pavements.

(1.) Bricks—The bricks for brick pavements will be hard-burnt weather bricks, straight on the top surface, and with perfect corners and angles, no bats or broken bricks will be used, excepting to finish out a course, or to finish around any post or other fixtures on the sidewalk.

(2.) Gravel—The gravel will be clean, free from clay or loam, with no pebbles more than 1½ inch in their largest dimensions.
48 All pebbles will be separated and surrounded with fine gravel or sand.

(3.) Sand—The sand will be clean and fine, free from clay or loam.

(4.) The slope of the surface will be a rise of one-fourth (¼) of an inch to the foot from the curb, unless otherwise specially ordered.

(5.) Excavations—The space over which the pavement is to be laid will be excavated to a depth of ten (10) inches below the top of the curb, with the slope which is to be given to the pavement On this bed will be spread a layer of gravel, to be four (4) inches deep—when well compacted, by ramming, the surface must be parallel with the surface of the brick when laid.

(6.) On this layer of gravel a layer of sand will be spread and compacted by ramming, the sand to be moistened, if necessary;
49 the top surface of the sand to be dressed to the proper height and slope to receive the brick pavement. The gravel and sand will be rammed to such an extent as may be required by the engineer, and to prevent any settling of the pavement.

(7.) Laying of the Brick—The bricks will be laid with the upper surface even with the top of the curb, and no allowance will be made for settling, as the gravel and sand must be compacted sufficiently to prevent any settlement.

(8.) The joints of the bricks will be laid close, and the top surface of the bricks will be laid to the proper grade.

(9.) After the pavement is laid the top surface will be covered with fine, dry sand, which will be swept over to fill the joints. After this is thoroughly done the pavement will be swept clean.

50 The contractor will be responsible for the good condition of the pavement for (8) months after the pavement is laid.

(11.) Whenever the words "Board" or "Board of Public Works," and the pronouns in place thereof, are used herein, they are to be considered as referring to the party of the first part to this contract.

(12.) Whenever the words "engineer" or "engineers," or the pronouns thereof, are used herein, they are intended to designate the chief engineer of said Board and the assistants acting under him.

(13.) Whenever the word "contractor" and the words "party of the second part," and the pronouns thereof, are used herein, they are to be considered as referring to and meaning the party or parties (as the case may be) of the second part to this contract.

51 BOARD OF PUBLIC WORKS,
DISTRICT OF COLUMBIA.

Specifications for layiny Sewer-pipe connections and Water and Gas service pipes.

(1.) Sewer-pipe for house connections and water and gas service pipes shall be laid from the main sewers, and from the water and gas mains, to such points beyond the curbstones as the Board of Public Works may from time to time determine.

(2.) The trenches will be excavated two (2) feet wider than the

pipes, and to such a depth and on such slope as the Board of Public Works may from time to time direct.

(3.) Where the average depth of the excavation for any one (1) trench does not exceed six (6) feet, no allowance beyond the price paid for laying the pipes will be paid, but the cost of such
52 excavations shall be included in and paid for in the price paid per foot for laying the pipes.

(4.) Where the depth of excavation for any one (1) trench exceeds six (6) feet, the excavation below the average depth of six (6) feet will be paid for for the length of pipe laid, and for a width of two and a half feet (2½ feet.)

(5.) The water pipe will be of lead, and the gas pipes of iron, of such strength and quality as may be required by any ordinances of the city of Washington, or any law, or regulation, or direction of the Board of Public Works relating thereto.

(6.) All stop-cocks, covers, street-washers, and gas stop-cocks, washers, and fixtures, will be of such form and dimensions as may be determined by the Board of Public Works.

53 (7.) All sewer-pipe connections will be of 6-inch Scotch vitrified stone pipe, or such other pipe as may be approved by the Board of Public Works.

(8.) All filling in the trenches will be made in the manner specified in the specifications of the Board of Public Works for laying sewer pipes; all trenches will be made to receive all the earth taken from them in addition to the pipes laid, and any deficiency of material will be made with gravel.

(9.) All sewer-pipes will be closed with earthen covers, close fitting not cemented.

(10.) The tapping of gas and water mains will be done only by the authorized tappers.

(11.) There will be a street-washer at the curb-end of each
54 water pipe, with iron box, stop-cock, and covers complete, and a stop-cock and box at the curb end of each gas pipe.

(12.) The price paid for laying water and gas service pipe, and stop-cock and sewer pipe connections, per foot of pipe laid, will include the pipe and stop-cocks, and all excavating and filling the trench, (not exceeding the average of six (6) feet in depth,) and for all labor and materials for the same. The price paid for each street-washer will include the street-washer and stop-cock and boxes, all fixtures connected therewith, and all excavation, material, and labor required therefor.

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
WASHINGTON, D. C., *April 24th*, 1872.

Specifications for Sodding Parks, etc.

The sods will be free of garlic and other noxious weeds,
55 and average two (2) inches in thickness. Before the sods are laid there will be eight (8) inches of good surface soil, prop-

erly graded and firmed so as to present an even surface and prevent depressions in filling.

Where grading has necessitated the removal of the original surface soil, the sub-soil will be picked up, thoroughly pulverized to a depth of six (6) inches before spreading the eight (8) inches of good soil, upon which the sods will be laid.

After the sods are laid, they will be consolidated and brought to a plane surface, either by passing a roller over them, or, in case of sloping surfaces, by beating with a spade.

ALEX. R. SHEPHERD,
Vice-President.

Second. It is further agreed that the said party of the first part shall appoint from time to time such person or persons, as
56 may be by said party deemed proper, to inspect the material to be furnished and the work to be done under this contract, and that such persons or person shall have any and all opportunity and privileges which may be necessary to enable them to faithfully make the inspection aforesaid.

Third. It is further agreed that the work under this contract shall be commenced immediately.

Fourth. It is further agreed that the said party of the first part may, and notice to the party of the second part, suspend work under this contract; but if not suspended, it shall be completed as soon as possible from the [—] fixed for its commencement, and that the said work shall not be sub-let without the consent in writing of the said party of the first part, and that any sub-letting or assignment,
57 without such consent, shall work a forfeiture of this contract.

Fifth. It is further agreed that if at any time the party of the first part shall be of the opinion that the said work, or any part thereof, is unnecessarilly delayed, or that the said contract is willfully violating any of the conditions or covenants of this contract, or is executing the same in bad faith, all of the work may be discontinued under this contract, or any part thereof; and the said party of the first part shall thereupon have the power to place such and so many persons as may be deemed advisable, by contract or otherwise, to work at and complete the work herein described, or any part thereof, and to use such materials as may be found upon the line of said work, or to procure other materials for the completion of the same, and to charge the expense of said labor and
58 materials to the party of the second part, and the expense so charged shall be deducted and paid by the party of the first part out of such moneys as may be then due, or may at any time thereafter grow due, to the said party of the second part, under and by virtue of this agreement, or any part thereof; and in case such expense is less than the sum which would have been payable under this contract if the same had been completed, the party of the second part shall be entitled to receive the difference, and in case such expense shall exceed the last said sum, the amount of such excess shall

be paid to the party of the first part by the party of the second part.

Sixth. It is further agreed that all loss or damage arising out of the nature of the work to be done under this agreement, or
59 from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, or from incumbrances to individuals, property, or otherwise, on the line of the work, or adjacent thereto, shall be sustained by the said contractor.

Seventh. It is further agreed that the said party of the second part shall punctually pay the workmen who shall be employed by him on work under this contract, in cash current, and not in what is denominated store-pay or orders; and that he will, from time to time, and as often as may be required by said party of the first part, furnish to said party satisfactory evidence that all persons who have done work or furnished materials have been paid as herein required. And if such evidence is not furnished, such sum or sums as may be necessary for such payment or claims shall be
60 retained by said party of the first part until the said claims shall be fully satisfied.

Eighth. And it is further agreed that partial payments shall be made by the duly authorized financial agent of the said party of the first part on the monthly estimates of the Chief Engineer of the Board of Public Works aforesaid, and that whenever the said Chief Engineer aforesaid shall certify, in writing, that the party of the second part has completely performed this contract on his part, and shall submit, with said certificate, his estimate of the amount due the party of the second part, then, within thirty (30) days, as hereinafter provided, the said party of the second part shall be entitled to receive the full amount due under this contract, deducting therefrom all previous partial payments which may have been made as hereinafter mentioned.

61 And it is further expressly agreed that no money shall become due and payable under this contract, except upon the certificate of said engineer, as hereinbefore provided; and the said party of the second part further agrees that he shall not be entitled to demand or receive payment for any portion of the aforesaid work, except in the manner set forth in this agreement, and when each and all of the stipulations hereinbefore mentioned are complied with, and the engineer shall have given his certificate to that effect, a final settlement shall be made in writing between the parties, and the whole amount found due the party of the second part under this contract shall be paid to him, excepting such sum or sums as may be retained under any provision of this contract; provided,
62 that partial payments may be made, under direction of the said party of the first, otherwise than upon the estimates of the said engineer, as provided above, if, in the opinion of the said party of the first part, the vigorous prosecution of the work will be promoted thereby.

Ninth. It is further agreed that if at any time during the period of three years from the completion of the work to be done under this contract, any part or parts thereof shall become defective from imperfect or improper material or construction, and, in the opinion of the said party of the first part, require repair, the said party of the second part will, on being notified thereof, immediately commence and complete the same to the satisfaction of the party of the first part; and, in case of a failure or neglect of the said party
63 of the second part so to do, the same shall be done under the directions and orders of the party of the first part at the cost and expense of the party of the second part.

Tenth. It is further agreed that the said party of the second part shall receive the following prices as full compensation for furnishing all the materials and labor which may be required in the prosecution of the whole of the work to be done under this agreement, and in all respects, completing the same, to wit: Grading, thirty (30) cents per cubic yard—to include the first two hundred (200) feet of hauling, and one (1) cent per cubic yard for every additional two hundred (200) feet of hauling.

Setting curb-stones, new 8″, per lin. ft., forty (40) cts.
" " 6″, " thirty (30) cts.
" " 5″, " twenty-five (25) cts.
Resetting " old 4″, " fifteen (15) cts.

Laying brick pavement, new, per sq. yd., eighty (80) cts.
64 Relaying brick pavement, old, per sq. yd., twenty-five (25) cts.

Provided, That bricks shall be furnished by the Board at a price not exceeding eleven dollars and fifty cents ($11.50) per thousand. Six (6) inch pipe, per lin. ft., thirty-six (36) cents; ¾ a. a. lead pipe, per lin. ft., fifty (50) cents; ¾ in. composite pipes, per lin. ft., ——; street-washer and box (iron), $6.12; stop-cock and box, $4.00. Parking, furnishing sod and soil, as per specifications, per square yard, fifty (50) cts.

For the Miller wood pavement burnettized, aforesaid, three dollars and fifty cents ($3.50) per square yard, to include two (2) feet of grading.

Which said sums or prices the said party of the first part shall pay to the said party of the second part, as herein provided.

Eleventh. It is further agreed that the measurements shall
65 be made by the engineer of the said party of the first part or his assistants.

Twelfth. And the said party constituting and composing the Board of Public Works in and for the District of Columbia, aforesaid, agree with the said party of the second part to perform all the stipulations of this contract obligatory in it, and to pay or cause to be paid to the said party of the second part, or to his heirs, executors, or administrators, in lawful money of the United States, the amount which may be found from time to time due him according to the contract.

Thirteenth. It is further agreed that this contract shall be subject to any and all provisions of an act, entitled, "An act to provide a government of the District of Columbia," approved February 21, 1871, so far as the same shall or may be in any respect applicable to said contract, and also to any law of the District of Co-
66 lumbia, pertinent thereto, or to any part thereof, as fully as if the same were particularly set forth herein.

In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written.

H. D. COOKE, [L. S.]
ALEX. R. SHEPHERD, [L. S.]
JAMES A. MAGRUDER, [L. S.]
——— ——— [L. S.]
——— ——— [L. S.]

Board of Public Works of the District of Columbia.

LEWIS CLEPHANE,
Contractor.

Signed and sealed in the presence of—
WM. E. NOTT.
GEO. T. HOWARD.
JOHN A. HURLEY.

67 Know all men by these presents, that we, Lewis Clephane, Francis H. Smith, and Thomas Lewis, of the District of Columbia, are held firmly bound unto Henry D. Cooke, Alexander R. Shepherd, James A. Magruder, Alfred B. Mullett, and Samuel P. Brown, constituting and composing the Board of Public Works of the District of Columbia, in the sum of twenty thousand (20,000) dollars, lawful money of the United States of America, to be paid to said Henry D. Cooke, Alexander R. Shepherd, Alfred B. Mullett, Samuel P. Brown, and James A. Magruder, constituting and composing the Board of Public Works of the District of Columbia, or to the certain attorney, successor, or assigns thereof; for which payment, well and truly made, we and each of us do bind ourselves and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

68 Sealed with our seals. Dated this ninteenth day of October, A. D. one thousand eight hundred and seventy-two.

Whereas the above bounden Lewis Clephane, by an instrument in writing under his hand and seal, bearing even date with these presents, has contracted with Henry D. Cooke, Alexander R. Shepherd, James A. Magruder, Alfred B. Mullett, and Samuel P. Brown, constituting and composing the Board of Public Works of the District of Columbia, to lay and put down the Miller wood pavement, on the carriage-way of Twelfth street N.W., from the south side of F street N.W. to P street N.W., in the city of Washington, D. C.; also to park, terrace, and furnish and set such Seneca stone steps as he may be required to furnish and set by the Chief

Engineer, or Park Commission of the party of the first part, on said Twelfth street N.W., between M and P streets N.W.; also,
69 to grade, set the curbstones, lay the brick foot pavements, and construct the water services, and sewer laterals on said Twelfth street N.W, between said M and P streets N.W., as fully described in foregoing contract and on the conditions and for the considerations in the aforesaid contract mentioned and contained, or referred to therein.

Now, therefore, the condition of the above obligation is such that if the said Lewis Clephane shall well and truly, and in a good, sufficient, and workmanlike manner, execute the work mentioned in said contract, and complete the same in accordance with the stipulations thereof, and in each and every respect fully comply with the provisions and requirements therein contained, then this obligation to be void, otherwise to remain in full force and virtue.

LEWIS CLEPHANE. [L. S.]
70 FRANCIS H. SMITH. [L. S.]
THOMAS LEWIS. [L. S.]

Signed and sealed in the presence of—
WM. E. NOTT,
GEO. T. HOWARD.

The plaintiff to further prove the issues upon upon its part joined offered and gave in evidence the following papers:

WASHINGTON, D. C., *August* 29, 1872.

Hon. BOARD OF PUBLIC WORKS.

GENTLEMEN: The grading, etc., of 12th street N. W. having been completed, I respectfully ask that the same may be measured.

Very respectfully,

L. CLEPHANE, *Contractor.*

(Indorsements.)

71 BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
WASHINGTON, *Sept.* 2*d*, 1872.

Respectfully referred to the eng'r.
By order of the Board,

CHAS. S. JOHNSON,
Ass't Secretary.

Respectfully referred to W. Forsyth, eng'r, for measurement,

Dec. 25, '72. *Ch'f Eng'r.*

Respectfully resumed in the measurement 2d Dec., 1872.
Dec. 31, 1872. WM. FORSYTH.

Respectfully referred to the auditor.
By order of the Board,

CHAS. S. JOHNSON,
Ass't Secretary.

72 WASHINGTON, *July 16th*, 1872.

Hon. BOARD OF PUBLIC WORKS.

GENTLEMEN: I respectfully ask a payment of three thousand ($3,000) dollars on ac't grading, curbing, water and sewer connections, &c., on 12th st., between F and M sts.

Very respectfully, L. CLEPHANE.

Endorsements: Respectfully referred to the chief engineer. By order of the Board. Edward Johnson, chief clerk.

Total amount of work done on 12th st. N. W., from F N. W. to M N. W., grading, curbing, sewer connections, and water service, $12,015.80.

Respectfully, B. OERTLEY,
Dep't Eng'r.

July 19, 1872.

73 JULY 24, '72.

Respectfully referred to the auditor.
By order of the Board.
CHAS. S. JOHNSON,
Ass't Secretary.

WASHINGTON, *Jan. 3d*, 1873.

Hon. BOARD OF PUBLIC WORKS.

GENTLEMEN: I respectfully request that the auditor be authorized to issue me a certificate for work done on 12th street, between F and P streets, a final measurement for said work having been made.

Very respectfully,
L. CLEPHANE.

(Indorsement.)

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
WASHINGTON, *Jan. 24th*, '73.

Respectfully referred to the auditor, who will issue certificates if the work has been measured up.
By order of the Board.
CHAS. S. JOHNSON,
Ass't Secretary.

74 *Pavements for Sidewalks and Carriage-ways.*

WASHINGTON, D. C., *December* 20, 1872.

DISTRICT OF COLUMBIA, TO LEWIS CLEPHANE, DR.

Deduct—		
5,391 9/12	6-in. curb, at $1.12	$6,038 76
1,335 7/12	5-in. curb, at 95c.	1,268 80
159	6-in. curb, at $1.75	278 25
237,613	bricks, at $14.50	3,445 38
		$11,031 19

14,179	sq. yds. new brick pavement laid, at 80c. per yd.	$11,343 20
5,391 9/12	running ft. 6-in. new curb and setting, at (bluestone) $1.42 per ft.	7,656 28
1,335 7/12	running ft. 5-in. new curb and setting, at (bluestone) $1.20 per ft.	1,602 70
1,570 4/12	running ft. 5-in. old curb and setting, at 25c. per ft.	392 66
159	" 6-in. granite circular curb and setting, $2.05 per ft.	325 95
41,000		
41,000	cubic yds. haul 4,000 ft. over 200 ft., at 20c per yd.	8,200 00
16,288	sq. yds. Miller wood pavement, laid at $3.50 per yd.	57,008 00
7,669	" sodding, at 50c. per yd.	3,834 50
3,006	running ft. Seneca coping and steps, $3.00	9,018 00
558	cubic ft brick-work, 50c.	279 00
		$111,960 29
	Deduct material, as above	11,031 19
		$100,929 10
75		
	Deduct certificates No. 1982 and 2538 of 1872	9,000 00
		$91,929 10
	Withhold 5 cts. per yard on 14,179 of brick pavement	708 95
		$91,220 15

Add difference on brick bet. Board price, $11.50 and cost, $15 on 510,444 brick, @ $3.50 per M, omitted in settlement and paid by certificate No. 1019 of 1873, for $1,786.55, making the gross amount of this bill $113,746.84, as per assessment voucher.

I do hereby certify that I have measured and inspected the work done by Lewis Chephane on the improvement of 12th street northwest, from south side F to so. side P, in sqrs., embraced in his bill dated Dec. 20, 1872, which work was done under the order of the Board of Public Works (contract No. 571, 1872,) and find it correct as to quantity and quality, and that the work has been done in conformity with the contract and specifiations relating thereto, and that the material and labor has been furnished as specified.

WM. FORSYTH,
Assistant Engineer.

Dated Dec. 20, 1872.

76 Approved, 187—.

R. C. PHILLIPS,
Chief Engineer B. P. W.

I certify that the foregoing bill is correct in form, and that the prices are according to contract, and is therefore audited in the sum of ninety-one thousand two hundred and twenty and $\frac{15}{100}$ dollars.

J. C. LAY,
Auditor B. P. W.

Dated Jan'y 9th, 1873.

After reading and giving in evidence the above papers and vouchers, the defendant admitted that he did the work covered by and

under said contract No. 571, as set out in said papers, and that the same was completed in the latter part of the fall of 1876. Evidence was given tending to proof that he received payment therefor in certificates, as appears by his receipt therefor indorsed thereon, and that he disposed of said certificates; that he received notice to repair said pavement laid by him under said contract No. 571
77 from the Engineer of the District of Columbia, said notice being in the words and figures following:

Repairs.

ENGINEER'S OFFICE, DISTRICT OF COLUMBIA,
WASHINGTON, *July* 8, 1875.

SIR: In accordance with the terms of your contract No. 571, with the Board of Public Works, you are hereby notified that the work done by you under said contract has become defective from imperfect or improper material or construction, and requires repair.

If the work of repair be not immediately commenced and satisfactorily completed, it will be done by this office, and the cost of the same will be charged to you.

By order of the Commissioners.

Very respectfully, R. L. HOXIE,
Lieut. Eng'rs U. S. A., Eng'r of D. C.

To LEWIS CLEPHANE, Esq., City.

78 To the admission of said notice in evidence the defendant duly objected.

The plaintiff further to prove the issues upon its part, joined, offered and gave testimony tending to show that subsequently to the act of June 20, 1874, and under the power conferred thereby, and up to the time of the passage of the act of Congress of June 11, 1878, R. L. Hoxie was the engineer of the District of Columbia, and as such had entire charge and control of all work of repair and improving the streets, avenues, alleys, &c., in the city of Washington, District of Columbia, under the general supervision of the Board of Commissioners of the District of Columbia; that as such engineer his attention was called to the condition of Twelfth street N.W., from F street to N street, the work covered by this suit, in
79 the summer of 1875; that said street between said limits, had been originally paved with wooden blocks by the defendant, but had, at said time in 1875, become unsuitable for use and travel, through the decay of the said wooden blocks composing the pavement on said street; that said pavement, on account of its condition, required immediate attention and repair; that by way of repair, the said blocks that composed said pavement that were unsound and decayed were taken up and a new pavement, known as the Vulcanite Concrete pavement, substituted in their place and stead, and such of said blocks as were sound or partially sound were used in patching up the remainder of said street; that said portion of said street so patched up with sound blocks, was on said 12th street, be-

tween M and N streets; that said engineer made a report of the condition of said street to the Commissioners of the District
80 of Columbia, and that the said blocks so relaid lasted until replaced by another and different pavement.

To so much of the testimony as tended to show that Hoxie, as engineer, had entire charge and control of all works of repair and improving streets, was admitted, notwithstanding the timely objection of the defendant's counsel.

The plaintiff further offered and gave in evidence the following documents and papers:

ENGINEER'S OFFICE, DISTRICT OF COLUMBIA,
WASHINGTON, D. C., *Aug. 16th*, 1875.

To the Honorable the COMMISSIONERS OF D. C.

GENTLEMEN: Referring to my letter of the 9th inst., recommending the repair of 12th street N. W., under section 9 of contract No. 571, I have the honor to state further, that the necessary preliminary steps under sec. 9, have been taken; notice having been sent,
81 as per enclosed copy, and no attention has been paid to it.

Very respectfully,
R. L. HOXIE,
Lieut. Eng'r U. S. A., Eng'r of D. C.

Repairs.

ENGINEERS OFFICE, DISTRICT OF COLUMBIA,
WASHINGTON, *July* 8th, 1875.

SIR: In accordance with the terms of your contract No. 571, with the Board of Public Works, you are hereby notified that the work done by you under said contract has become defective from imperfect or improper material or construction, and requires repair. If the work of repair be not immediately commenced, and satisfactorily completed, it will be done by this office, and the cost of the same will be charged to you.

By order of the Commissioners.

Very respectfully,
(Sg'd) R. L. HOXIE,
Lieut. Eng'r U. S. A., Eng'r of D. C.

To LEWIS CLEPHANE, Esq., City.

A true copy—
FRANK T. HOWE, *D. C.*

82 ENGINEER'S OFFICE, DISTRICT OF COLUMBIA,
WASHINGTON, D. C., *Aug. 9th*, 1875.

To the Honorable the COMMISSIONERS OF D. C.

GENTLEMEN: The pavement on 12th street, between F and N streets N.W., which was laid by Lewis Clephane, under his contract No. 571 with the late Board of Public Works, is in a fearful condition.

I recommend that, under the provision of section 9 of your contract, Messrs. Crawford and Hoffman be placed upon the work of repair.

The method in this case to be that indicated by me in my report upon paper No. 3560 E. O. 1875, viz., one or more squares of the wood pavement to be taken up and replaced by a concrete, and the sound block so obtained to be used in repairing the rest of the street, excepting the space between the curb corners at the
83 intersection of 12th and H streets N. W., to be paved by Mr. H. A. Willard, with clinker brick on edge at actual cost.

Very respectfully, R. L. HOXIE,
Lieut. Eng'r U. S. A., Eng'r of D. C.

(Indorsements:) Office of the Commissioners of the District of Columbia. Washington, Aug. 16th, 1875. Respectfully returned. Approved. By order. Wm. Tindall, Sec'y. Referred in engineer's office to M. Brown. Prepare papers.

To the admission of the documents in evidence the defendant, by its counsel, duly objected.

84 After reading and giving in evidence said papers R. L. Hoxie, the engineer of said plaintiffs testified as to the genuineness of his signatures attached to said letters and papers, and that the said papers came from the Commissioners' office of the District of Columbia; that there was an order giving to him by the Commissioners of the District, to notify the defendant to repair said pavement, but that he did not remember whether the same was in writing or not: which evidence was admitted, notwithstanding the timely objection of the defendant by his counsel; that pursuant to his recomendations to said Commissioners as set out in said papers last offered, and given in evidence in reference to the work by the defendant, the said Commissioners executed a contract with Henry L. Cranford and Lindley M. Hoffman, to carry out substan-
85 tially the recommendation made by him to them as set out in said papers.

The plaintiffs to further prove the issue upon its part, joined, offered, and gave the testimony of the subscribing witnesses to a certain other contract, tending to prove the due execution thereof by the parties thereto: the said contract being known as Extension of contract No. 571, and made between the Commissioners of the District of Columbia, and Henry L. Cranford and Lindley M. Hoffman.

And the plaintiff also offered and gave in evidence the said contract, the same being in the words and figures following, which said contract was admitted in evidence, notwithstanding the timely objection of the defendant's counsel.

Extension of Contract No. 571.

Whereas the Board of Public Works of the District of Co-

contained, then this to be void, otherwise to remain in full force and virtue.

HENRY L. CRANFORD. [SEAL.]
LINDLEY M. HOFFMAN. [SEAL.]
NATH'L W. FUGITT. [SEAL.]
F. C. CATE. [SEAL.]

Signed and sealed in the presence of—
JOHN A. HURLEY.

93 In consideration of the provisions of a certain contract, entitled, Extension of contract No. 571, and entered into on the 30th day August, 1875, between the Commissioners of the District of Columbia, and Henry L. Cranford and Lindley M. Hoffman, and in order to clearly set forth the true interpretation and effect of said contract, it is hereby stipulated that it is the true meaning of said contract, that if at any time during the period of three years from the completion of the work to be done thereunder, any part or parts thereof shall become defective from imperfect or improper material or construction, and in the opinion of the parties thereto of the first part require repair, the parties thereto of the second part will, on being notified thereof, immediately commence and complete the same to the satisfaction of said parties, and
94 cause and maintain said work to be at the end of said period of three years in good condition and repair, and free from defect and from imperfect or improper material or construction, and in case of failure or neglect of said parties of the second part so to do, the same shall be done under the directions and orders of the said party of the second part.

These stipulations do not apply to wood pavements relaid under this contract, nor to any work except the laying and resurfacing of concrete pavements.

Witness our hands and seals, this fourteenth day of October, 1875.

HENRY L. CRANFORD.
LINDLEY M. HOFFMAN.

For the consideration and purpose above stated, we hereby assent to the above as being a true interpretation of one of the conditions of the above-mentioned contract covered by the bond on which we are sureties dated.

95 Witness our hands and seals, this 14th day of October, 1875.

NATH'L FUGITT.

Witness: CHAS. JOHNSON.

Whereas by a certain agreement between the Commissioners of the District of Columbia, of the first part, and Henry L. Cranford and Lindley M. Hoffman, of the second part, bearing date of the 30th day of August, 1875, for the extension of contract No. 571, it is agreed among other things as follows, to wit: For other work done "under this agreement they" (the said Cranford and Hoff-

man) shall receive twenty per cent. additional upon the actual cost, to be determined by the original bills, attested by affidavit and verified by the overseer; provided, that payment be made in the hereinbefore mentioned bonds at their market value at the New York Stock Exchange at the date of each settlement. Now it is understood and agreed between the Commissioners of the
96 District of Columbia and the said Henry L. Cranford and Lindley M. Hoffman, parties as aforesaid agreement, that in lieu of so much of said agreement as is hereinbefore recited, the following shall be taken and held by and between said parties as a substitute therefor, to wit: That in estimating the compensation to be paid the said Henry L. Cranford and Lindley M. Hoffman for repairing the pavement on the carriage-way of 12th street, from F to N streets N. W., the actual cost of said work shall be allowed them, with such addition thereto as the engineer of the District of Columbia shall estimate to be just and reasonable.

In witness whereof the Commissioners of the District of Columbia, successors to the Board of Public Works, appointed under the act of Congress, entitled "An act for the government of the District of Columbia, and for other purposes," approved June 20,
97 1874, and the parties of the second part to these presents, have hereunto set their hands and seals, this 16th day of November, 1875.

—— —— [SEAL.]
—— —— [SEAL.]
S. L. PHELPS, [SEAL.]
Commissioners of the District of Columbia.

HENRY L. CRANFORD, [SEAL.]
LINDLEY M. HOFFMAN, [SEAL.]
Contractors.

Signed and sealed in the presence of—
WM. A. BROWN.

98 After reading and giving in evidence the said contract the plaintiff, to further prove the issues upon its part joined, offered and gave testimony tending to show that the work done under said contract was done under the direction and supervision of said Hoxie, as engineer of the plaintiff, and that the same was measured and inspected under his orders and approved by him, and the plaintiff then offered and gave in evidence the following paper and voucher, all of which was admitted in evidence, notwithstanding the timely objection of the defendant's counsel.

99 *Pavements for Sidewalks and Carriage-ways.*

WASHINGTON, D. C., *Oct.* 4, 1875.

DISTRICT OF COLUMBIA,

TO CRANFORD AND HOFFMAN, Dr.

13,039⅓ sq. yds. concrete pavement laid, at $3.00 per sq. yd.	$39,118 33
111⅑ sq. yds. resurfacing, $1.40	156 18
Taking up and relaying wood pavement, removing debris, &c., as per sub-vouchers	1,242 92
Total for assessment	$40,517 43

I hereby certify that I have carefully examined the field notes and report of S. F. Adams, leveler, who measured and inspected this work, and find the quantities correct. This work is reported to be contract 571, 12th street N. W., between F and N sts.

S. B. BODFISH,
Oct. 4, 1875. *Assistant Engineer*

Materials furnished upon this or other contracts brought forward from voucher No. 660, value $11.62, to materials furnished since last report upon contract No. ——. None furnished.

100 I certify that the foregoing is a correct account of materials furnished, and that the prices charged are the net value of the material at the point where delivered, or in accordance with contract.

E. B. TOWNSEND,
Oct. 5th, 1875. *Superintendent of Property.*

I have carefully examined the account, and find the prices, according to contract and the computations, correct.

The amount due the contractor is to be ascertained by deducting from the above cost of the work the total advances unsettled, and also for not previously charged, the sum of ———.

B. OERTLEY,
Oct. 6th, 1875. *Assistant Engineer.*

Approved, subject to future inspection of the work.

R. L. HOXIE,
Lieut. Eng'rs U. S. A., and Eng'r for D. C.

Oct. 6th, 1875.

101 After the reading and giving in evidence the said paper and voucher, the plaintiff, to further prove the issues upon its part joined, offered and gave the testimony of H. L. Cranford, who testified that he was one of the contractors forming the firm of Cranford and Hoffman, who did the work of repairing the street involved in this suit; that only a small portion of the blocks laid

by the defendant and taken up by said Cranford were fit to be relaid, and the same were relaid by him under his contract, and that he received [for] same $1,200 for such relaying, as appears on the voucher last put in evidence, and his receipt for payment of said work; that the work of repairing the said 12th street, between the limits covered by his contract, was done in the fall of 1875; that he received payment for said work from the Board of Audit,
102 and that the signature to said receipt is that of Mr. L. M. Hoffman, the other contracting party, and is the signature of the firm of Cranford & Hoffman.

The plaintiff then offered and gave in evidence the said receipt, in the words and figures following, all of which said evidence was admitted, notwithstanding the defendant's objection.

WASHINGTON, D. C., *Oct. 7th*, 1875.

DISTRICT OF COLUMBIA, TO CRANFORD & HOFFMAN, Dr.

For contract No. 571. Extension. Final measurement.

Surface, 12th street N.W., F to N	$39,118 33
Resurfacing and repairs, same street	1,399 10
Total	$40,517 43

Received this seventh day of Oct., 1875, from the Board of Audit their certificate No. 19032 and 33 for $40,517.43, in full settlement of the above stated claim.

CRANFORD & HOFFMAN.

103 Indorsement: Office Board of Audit. Washington, Oct. 6, 1875. Class 4, No. 2105. Claims against the Board of Public Works for which no evidence of indebtedness has been issued. Contract No. 575, 12th street, F to N. Ownership claimed by Cranford & Hoffman. Office Board of Audit. Washington, October 7th, 1875. The within claim against the Board of Public Works has been examined, and amount due as per within statement, $40,517.43. Chas. A. Appel, ass't acc't.

104 The plaintiff having put in evidence as above set forth, and the same being all the evidence taken in the cause in the trial, the plaintiff rested. The defendant, by his counsel, thereupon demurred orally to the evidence offered and given on behalf of the plaintiff, and asked the court to instruct the jury that upon the evidence introduced by plaintiff it was not entitled to recover, and that their verdict should be for the defendant; but the counsel for the plaintiff objected to the consideration of such motion by the court as made and excepted, that the question of the plaintiff's right to recover upon the evidence presented by it could not be raised by such a motion but only by a demurrer reduced to writing; that the plaintiff might take issue thereon in writing; to which ruling of the court

in overruling the objection made by the plaintiff, the said plaintiff then and there excepted, and the exception was noted by the
105 court before the giving of the verdict herein, which was for the defendant; and the counsel for the plaintiff requests the court to sign, seal, and enroll this its first bill of exceptions, according to the form of the statute in such case made and provided, and it is accordingly done now and then, this 29th day of April, 1882.

ARTHUR MAC ARTHUR, [SEAL.]
Justice.

After the signing, sealing, and enrolling of the plaintiff's first Bill of Exceptions, which is made part hereof, the court among other things instructed the jury as follows:

Undoubtedly the sense in which the word repair has been interpreted, as found in the statute here, has received a very liberal construction from the very necessity and nature of the case.

The streets of city were pretty much all laid out, and per-
106 haps no city in the United States had worse streets than Washington, and they required a thorough overhauling, and it might be said repair. Hence the most extraordinary system of excavating and grading, both up and down, took place, and new pavements were laid under this grant of power to keep the streets in order and to repair them.

I am inclined to think that the word repair as it occurs in a contract is to receive a more limited definition than it would in a grant of power to municipal authorities.

There are one or two points which I think are fatal to this action, and they arise virtually upon the face of the contract, of course in construing this contract there are two (2) points to be considered. First, the terms in which it is expressed, and then the subject-matter which the contract relates to.

Now, I think under this contract it was incumbent upon
107 the plaintiff to show that there had been a defect in the material or in the construction of the pavement.

I cannot regard this contract as the counsel for the District do, as a guarantee beyond all hazards to keep this street good for three years (3.)

The contract calls for a pavement to be constructed of wooden blocks treated in a certain manner, and it requires that the contractor shall keep it free from defects for three years (3), arising out of the defect of material or construction.

Now, how long material treated as this was, if treated properly and sound, would last upon a pavement of course there is nothing to show, no evidence to establish that circumstance. The fact is apparent that this street did go to ruin in a short time, two (2) or three (3) years, and that not that street alone, but all others that was similarly constructed shared the same fate, and in point
108 of fact it became so obnoxious that the Commissioners very justly concluded to have no more of them, but substituted a

different pavement entirely in its place, which they had a very right to do, but I doubt whether they could do that under the contract.

Now let us test this: Could they call upon Mr. Clephane to lay a concrete pavement? What he undertook to do was to repair the pavement of wooden blocks, the wood being treated by a certain process. They could not have called upon him to have done more than to have kept that up with the same kind of material. I think they did right in laying an expensive and beautiful improvement on the street, and I think they did right in abandoning any such contract as they had entered into.

Now I may be wrong in regard to that matter, although it
109 is pretty apparent to my mind, but I do not think that I can be wrong in the true construction of this contract, that it is not a guarantee to keep the street in good order. It is only a guarantee to keep it in repair from all defects arising from poor material and bad workmanship.

Well, for aught that appears here, the material was what it is claimed. There is no evidence here that it was not. It was a poor thing in itself, and therefore you could not make a good street out of it, as it turned out. There is not a scintilla of testimony here but what the defendant complied with his contract with regard to the material and with regard to workmanship. If Mr. Riddle is right in construing this contract, then of course Mr. Clephane has got himself into a liability from which he cannot escape.

I do not think any more of ordinary precaution would
110 enter into such a contract, or have intended to do it, but still being unable to take the same view of this contract that Mr. Riddle does, I most hold that there is a failure here to prove a contract, and the jury should return a verdict for the defendant for these reasons.

To so much of the instructions of the court to the jury as instructs the said jury, as follows:

"I am inclined to think that the word repair, as it occurs in a contract, is to receive a more limited definition than it would in a grant of power to munincipal authorities;" the plaintiff, by its counsel, then and there excepted, and the exception was duly noted by the court upon its minutes before the giving of the verdict herein, and the plaintiff, by its attorney, requests the court to sign, seal, and enroll this its second bill of exceptions, according to the form of the statute in such case [made] and provided, and it is accordingly done now for then, this 29th day of April, 1882.

ARTHUR MAC ARTHUR, [SEAL.]
Justice.

After the signing, sealing, and enrolling of the plaintiff's
111 second bill of exceptions, which is made part hereof, the court further instructed the jury as follows:

"Now, I think under this contract it was incumbent upon the

plaintiff to show that there had been a defect in the material or in the construction of the pavement."

To which instruction the plaintiff, by its counsel, then and there excepted, and the exception was noted by the court on its minutes before the giving of the verdict herein; and the plaintiff, by its counsel, prays the court to sign, seal, and enroll this its third bill of exceptions, according to the form of the statute in such case made and provided, and it is accordingly done now for then, this the 29th day of April, 1882.

ARTHUR MAC ARTHUR, [SEAL.]
Justice.

After the signing, sealing, and enrolling of the plaintiff's third bill of exceptions, which is made part hereof, the court further instructed the jury as follows:

"I cannot regard this contract as the counsel for the District do, as a guarantee beyond all hazards to to keep this street good for three (3) years."

112 To which said instructions the plaintiff, by its counsel, then and there excepted, and the exception was noted by the court on its minutes before the giving of the verdict herein; and the plaintiff by its counsel, prays the court to sign, seal, and enroll this its fourth bill of exceptions, according to the form of the statute in such case made and provided, and it is accordingly done now for then, this 29th day of April, 1882.

ARTAUR MAC ARTHUR, [SEAL.]
Justice.

After the signing, sealing, and enrolling of the plaintiff's fourth bill of exceptions, which is made part hereof, the court further instructed the jury as follows:

"Now let us test this: Could they call upon Mr. Clephane to lay a concrete pavement? What he undertook to do was to repair the pavement of wooden blocks, the wood being treated by a certain process. They could not have called upon him to have done more than to have kept that up the same kind of material."

To which instruction the plaintiff, by its counsel, then and there excepted, and the exception was noted by the court on its
113 minutes before the giving of the verdict herein; and the plaintiff, by its solicitor, prays the court to sign, seal, and enroll this, its fifth bill of exceptions, according to the form of the statute in such case made and provided, and it is accordingly done now for then, this the 29th of April, 1882.

ARTHUR MAC ARTHUR, [SEAL.]
Justice.

After the signing, sealing, and enrolling of the plaintiff's fifth bill of exceptions, which is made part hereof, the court further instructed the jury as follows:

"But I do not think that I can be wrong in the true construction of this contract, that it is not a guarantee to keep the street in good order. It is only a guarantee to keep it in repair from all defects arising from poor material and bad workmanship."

To which instruction the plaintiff, by its counsel, then and there excepted, and the exception was duly noted by the court before the giving of the verdict herein; and the plaintiff, by its counsel, prays the court to sign, seal, and enroll this its sixth bill of exceptions, according to the form of the statute in such case made and
114 provided, and it is accordingly done now for then, this the 29th day of April, 1882.

ARTHUR MAC ARTHUR, [SEAL.]
Justice.

After the signing and sealing and enrolling of the plaintiff's sixth bill of exceptions, which is made part hereof, the court further instructed the jury to return a verdict for the defendant.

To which instruction the plaintiff, by its attorney, then and there excepted, and the exception was duly noted by the court on its minutes before the giving of this verdict herein; and the plaintiff, by its attorney, prays the court to sign, seal, and enroll this its seventh bill of exceptions, according to the form of the statute in such case made and provided, and it is accordingly done now for then, this the 29th day of April, 1882.

ARTHUR MAC ARTHUR, [SEAL.]
Justice.

115 *Proceedings in General Term.*

Supreme Court of the District of Columbia, sitting in General Term.

THURSDAY, *January* 4, 1883.

Session resumed pursuant to adjournment. Present: Chief Justice Cartter and Justices Cox and James.

THE DISTRICT OF COLUMBIA, Plaintiff,
vs.
LEWIS CLEPHANE, Defendant. } At Law. No. 19781. Cal. 81.

Argued by Francis Miller and Mr. Riddle in support of the plaintiff's motion for a new trial upon exceptions, and by Mr. Mattingly and Mr. Cole *contra*, and submitted to the court.

* * * * *

MONDAY, *January* 8, 1883.

Session resumed pursuant to adjournment. Present: Chief Justice Cartter and Justices Cox and James.

THE DISTRICT OF COLUMBIA, Plaintiff,
vs.
LEWIS CLEPHANE, Defendant. } At Law. No. 19781. Cal. 81.

Now again come here the parties by their respective attor-

116 neys; whereupon, because it appears to the court here that there is not in the record and proceedings or in the judgment of the special term any error therefore, it is considered that the said judgment be, and it is hereby, affirmed with costs, to be taxed by the clerk, and that defendant have execution thereof.

117 *Order for Writ of Error, filed Jan.* 13, 1883.

In the Supreme Court of the District of Columbia, the 13th day of January, 1883.

THE DISTRICT OF COLUMBIA
vs.
LEWIS CLEPHANE. } At Law. No. 19781.

The clerk of said court will please issue a writ of error in this cause.

A. G. RIDDLE,
Att'y for Plaintiff.

118 *Writ of Error and Citation.*

UNITED STATES OF AMERICA, *ss*:

The President of the United States to the Chief Justice and Justices of the Supreme Court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between the District of Columbia, plaintiff, and Lewis Clephane, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by its complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf. Therefore, you are hereby commanded, if judgment be herein given, under your seal, distinctly and openly, to send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Honorable Morrison R. Waite, Chief Justice of the United States, this 18th day of January, in the year of our Lord 1883, and of the Independence of the United States the one hundred and seventh.

[SEAL.] R. J. MEIGS, *Clerk*.

DISTRICT OF COLUMBIA, *to wit*:

To Lewis Clephane.

You are hereby cited and admonished to be and appear at a

Supreme Court of the United States to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein the District of Columbia is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so tha tspeedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

D. K. CARTTER,
Chief Justice.

Service acknowledged.
Jan'y 20.

WILLIAM A. COOK,
Att'y for Clephane.

119 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court, this 2d day of May, 1883.

[SEAL] R. J. MEIGS, *Clerk.*

Justice's Certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal, this 2d day of May, 1883.

D. K. CARTTER, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court, this 2d day of May 1883.

[SEAL.] R. J. MEIGS, *Clerk.*

Endorsed on cover: Dist. of Columbia supreme court. No. 966. The District of Columbia, plaintiff in error, *vs.* Lewis Clephane. Filed 21st September, 1883.

110-212

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 966.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

LEWIS CLEPHANE, DEFENDANT IN ERROR.

In Error to the Supreme Court of the District of Columbia.

BRIEF FOR PLAINTIFF IN ERROR.

A. G. RIDDLE,
For the District.

Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 966.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

LEWIS CLEPHANE, DEFENDANT IN ERROR.

In Error to the Supreme Court of the District of Columbia.

BRIEF FOR PLAINTIFF IN ERROR.

THE CASE.

The plaintiff counted on this statement of facts. The late Board of Public Works of the District, contracted with the defendant to lay a pavement of wood, known as the "Miller wood pavement," on 12th street, from F to P streets, northwest, in the city of Washington, to be prepared in a specified way. For contract see Record, p. 13, &c.

The 9th paragraph of the same, provided, that if the pavement should fail within three years, from imperfect or improper material or construction, the defendant, on notice, should repair the same, and on his refusal, the District should do it at his expense, (p. 20.)

Plaintiff alleges failure within the specified time, by reason of defective material and imperfect work. Avers notice to the defendant to repair, and failure on his part to do the same; by reason of which, under the provisions of said 9th paragraph of said contract, the plaintiff contracted with other parties to repair the same, at a cost of $40,517, which the defendant refused to pay.

To the declaration, the defendant put in twelve several pleas, and as the cheapest method, the plaintiff took issue on them severally, (p. 8). Though several wholly immaterial issues were thus formed, there was a sufficient issue on which the real matter involved could be tried.

The plaintiff's bill of exceptions shows the course, result of the trial, and discloses the questions for consideration here. (Record, p. 13.)

ASSIGNMENT OF ERRORS.

The Court erred—

1st. In permitting the defendant to demur orally.

2d. In sustaining the demurer.

3d. There was sufficient competent evidence on the part of the plaintiff to entitle it to have the case submitted to the jury.

4th. In ruling that the ninth paragraph of the contract did not bind the defendant to repair said pavement, if as a pavement it decayed or failed within the three years named.

5th. In holding that by the terms of said contract the defendant was only bound to repair said pavement with wood, similar to that specified in said contract.

6th. In holding that the District could not maintain its said suit.

POINTS AND REMARKS.

First. An oral demurrer to evidence is unknown to good practice.

See Fowl *vs.* Alexander, 11th Wheaton, 320; 6 Curt., 608.
Young *vs.* Black, 7th Cranch, 565; 2 Curt., 669.

Second. The term "repair," in reference to the streets of the District, occurs in the legislation of Congress, and notably in the grant of power to the late Board of Public Works, in the 37th section of the act of February 21, 1871, (16 Stats., 419; Rev. Stats., D. C., sec. 77.) The Board was authorized to keep the streets in repair, under which it entered upon a great scheme of original improvements, sustained by Congress, (act of June 19, 1878, and of June 29, 1879,) as also by the Supreme Court of the United States, in the Mattingly case, 97 U. S., 687. See also the District *vs.* The W. and G. R. R. Co., 10th W. Law Reporter, 179.

There is nothing in the term repair that should restrict the new work required to replace the rotten wood, to the use of the same defective material first employed.

It is clear, I think, that the court is wrong in its use of the word repair, and its consequent conclusion, as used in the four first paragraphs of its charge. (Rec., p. 34; also par. 1st, top of p. 35.)

It is also to be borne in mind that the notice to the defendant was limited to repairing alone. He was never at any time required to lay a different pavement from that stipu-

lated for in his contract. (See notice served on him. Rec., p. 26.)

It was only when he refused, and the work fell to the District to do, that it decided, as it might, to repair with the concrete pavement.

Third. What is the real ground, if any, why the defendant could not, at the discretion of the District, be compelled to lay a different pavement under his agreement to repair? It is to be remembered that the wooden pavement, as a pavement, was a total failure. That to repair it, was to lay a new pavement in fact; whether of wood or other material, and this under the supervision of the District.

The only apparent objection would seem to be that a pavement of other material would cost more, and the defendant could not be subjected to greater cost.

The court, in the paragraph of its charge last referred to above, (par. 1st, top of p. 35,) seems to suppose that the pavement actually laid in the repair of the street, cost more than the wooden pavement laid by defendant.

By reference to the defendant's contract it will be seen that he was paid three dollars and fifty cents per square yard. (Rec., p. 20.) That, as is seen, includes, or may include, two feet of grading. That was a formal matter in all contracts. In this, the fifteenth paragraph provides for the grading separately, which was thirty cents per cubic yard. Even if any grading was done under this subsequent provision, say the full two feet, that would be two thirds of a yard, costing twenty cents, which deducted from the price, $3.50, leaves $3.30 per yard for the wooden payment.

On turning to page 32 it will be seen that the bulk of the

new—the concrete pavement—cost but $3.00 per square yard, while a small part cost $1.40, so that the difference in cost was largely in favor of the new pavement.

Fourth. The ninth paragraph is as follows:

Ninth. It is further agreed, that if at any time during the period of three years from the completion of the work to be done under this contract, any part or parts thereof shall become *defective* from *imperfect or improper* material or construction, and, in the opinion of the said party of the first part, require repair, the said party of the second part will, on being notified thereof, immediately commence and complete the same to the satisfaction of the party of the first part; and, in case of a failure or neglect of the said party of the second part so to do, the same shall be done under the directions and orders of the party of the first part at the cost and expense of the party of the second part.

What is the fair meaning of this stipulation? Wood pavements at that time were unknown. It may amaze us now, that any one could ever have placed confidence in wood, however treated, as material for pavements; but they did.

In effect, the defendant says above, this material, thus prepared, is proper for a pavement. If you will let me put it down, and it rots, by reason of defect in the material, or it proves to be improper, or by reason of imperfect work, in three years, I will make it good. You shall see the material as prepared, and the mode of placing it in the street. I say it is proper, and I will make the material and the work good for three years, if exposed only to the usage of a pavement under ordinary conditions of wear. The District says very well, lay it down, if it lasts three years, the District will risk it after that time.

Within the time, four-fifths of the blocks within the space between F and N streets rotted. There is no pretense of any unusual usage of the pavement. The defendant is called upon to make it good, and answers: Show me that the material was defective, that it was improper. The District replies, it has rotted, which proves that it was defective, that it was improper. The District showing this, it is for the defendant to prove the material was good and proper, as is submitted.

The court intervenes and says, there is no proof that good material prepared as this was, would or should last three years; nor that wood is improper material for street pavement.

Beyond the universal experience, that good sound wood, on top of the ground, does not rot in three years, we have the distinct proof that a very consderable portion of this very material, taken from the street, between F and N, was employed, with the blocks remaining sound on the north part of the street in the repair of the work done by the defendant. Nothing can be more conclusive than this. (See Cranford's Evidence, bottom of p. 32.)

This was the condition of a portion of the material after the date of the contract for repair, which was August 30th, 1875, (Rec., p. 29,) and these sound blocks, with a portion standing sound, made a wooden pavement, for which work, the District paid the new contractors $1,242.92. (Rec., p. 32.) This was merely the cost of putting the blocks in place.

Clearly the defendant assumes that wood is a proper material for pavement, and must make that good. Our proof shows that it was improper.

If the District is right in its estimate of the ninth paragraph of the defendant's contract, that it was in the nature of a guaranty that the pavement should last three years, and wood proper material, then its case was perfect.

If the court was right—that it was incumbent on the plaintiff to prove that material prepared as this was to be—would last three years and more, that requirement was met by proof, that a part of the very material put down by the defendant, did last more than the stipulated time; conclusive, that if all had been equally good, the pavement would have lasted the required time. What more can be required of the District?

This was all the proof on this point. The District had a right to have this submitted to the jury. It was sufficient uncontradicted to rest a verdict upon for the plaintiff.

If the court could dispose of the case on the demurrer, then under the rules, as recognized in the cases referred to, the judgment should have been for the plaintiff.

This is one of many cases involving heavy amounts. It is now apparent that it might have been placed in better form as to some minor details. It is hoped, however, that in passing upon this record, the District will be advised as to the more important matters common to all the cases.

Respectfully submitted.

A. G. RIDDLE,
For the District.

110-212

Supreme Court of the United States

October Term, 1883.

No. 966.

DISTRICT OF COLUMBIA, Plaintiff in Error,

vs.

LEWIS CLEPHANE, Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

W. F. MATTINGLY,
C. C. COLE,
WM. A. COOK,
Attorneys for Defendant in Error.

Thomas McGill & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

October Term, 1883.

DISTRICT OF COLUMBIA, plaintiff in error,
vs.
LEWIS CLEPHANE, defendant in error. } No. 966.

BRIEF FOR DEFENDANT IN ERROR.

The substance of the declaration is that on October 19, 1872, the defendant, as party of the second part, by contract under his seal, agreed with certain named persons, constituting the late Board of Public Works of the District of Columbia, as party of the first part, in a good, sufficient, and workmanlike manner, and according to specification in said contract, to lay and put down the "Miller wood pavement" on the carriageway of 12th street N. W. from F to P street, and that in said contract the defendant covenanted that if at any time within three years from the completion of the work any part of it "*shall become defective from imperfect or improper material or construction,*" and in the opinion of the party of the first part require repairs, then upon notice the party of the second part will do the repairs at once, and in case of failure the same shall be done under the direction of the party of the first part at the cost of the party of the second part.

That the party of the first part and their successors fully performed all they were required to do by the contract, but that the defendant did not execute said work in a good, sufficient, and workmanlike manner, in accordance with

the specifications, and that within three years from its completion a part of the same, to wit, from F to N street, "*became defective from imperfect and improper material and construction.*"

That on July 8, 1875, the defendant was notified of said defective work and called upon to repair the same, and in default that it would be repaired at his cost.

That the defendant refused and neglected to repair, and the Commissioners were compelled to have the same repaired at a cost of $40,517, which amount the plaintiff claims to recover with interest from July 8, 1875.

Plaintiff's Proofs.

The plaintiff undertook to substantiate the averments of this declaration by the following evidence:

1st. The contract between the then members of the Board of Public Works and the defendant, (Record, p. 13.)

This contract shows that Clephane, in consideration of *lawful money of the United States*, to be paid him from time to time as the work progressed and the balance on final measurement, agreed to lay the "*Miller wood pavement*" on the carriageway of Twelfth, from F to P street, *the wooden blocks to be treated after the process known as and called the burnetizing process, in accordance with the specifications following for burnettizing.* Then follow long specifications for the treatment of the wood blocks.

It provides (Record, p. 18,) for the appointment by the party of the first part *of an inspector to inspect the material to be furnished and the work to be done.*

It provides that the defendant shall pay his workmen in cash, (p. 19;) otherwise the amount may be retained.

It provides (p. 19) for partial payments, and that whenever the chief engineer of the board "shall *certify in writing that the party of the second part has completely performed this contract on his part,*" and shall submit his estimate of

the amount due them, the party of the second part shall be entitled to receive the full amount due after deducting all previous partial payments; "*that no money shall become due and payable under this contract except upon the certificate of said engineer as hereinbefore provided.*"

"Ninth. It is further agreed that if at any time during the period of three years from the completion of the work to be done under this contract *any part or parts thereof shall become defective from imperfect or improper material or construction*, and in the opinion of the said party of the first part require repair, the said party of the second part will, on being notified thereof, immediately commence and complete the same to the satisfaction of the party of the first part; and in case of a failure or neglect of the said party of the second part so to do, the same shall be done under the directions and orders of the party of the first part at the cost and expense of the party of the second part."

2d. Request of Clephane for measurement and for certificate from the auditor, with order of the board that certificates issue if the work has been measured up.

3d. Detailed measurement bill for the work, amounting to $91,220.15, with certificate of engineer and auditor as follows: (pp. 23, 24.)

"I do hereby certify that I have measured and inspected the work done by Lewis Clephane on the improvement of Twelfth street northwest, from south side F to south side P, in squares ———, embraced in his bill dated December 20, 1872, which work was done under the order of the Board of Public Works, (contract No. 571, 1872,) *and find it correct as to quantity and quality, and that the work has been done in conformity with the contract and specifications relating thereto, and that the material and labor has been furnished as specified.*

Dated December 20, 1872.

WM. FORSYTH,
Assistant Engineer.

Approved, 187–.

R. C. PHILLIPS,
Chief Engineer, B. P. W.

I certify that the foregoing bill is correct in form and that the prices are according to contract, and is therefore audited in the sum of ninety-one thousand two hundred and twenty and 15-100 dollars.

Dated January 9, 1873.

J. C. LAY,
Auditor, B. P. W."

4th. Evidence relied upon by the plaintiff as proof of payment, being the endorsement on the foregoing certificate of the engineer, showing Clephane's receipt for auditor's certificates, as follows, (p. 33:)

"Endorsed: Account No. ——, B. P. W., No. 8,303. Pavements for sidewalks and carriageways. December 20, 1872; Lewis Clephane's bill for work done on Twelfth street northwest, F to P streets, $———, ——— measurement.

Received January 9, 1873.

Certificate	74*a*	$25,000 00
do	74*b*	25,000 00
do	74*c*	20,000 00
do	74*d*	21,220 15
		$91,220 15

L. CLEPHANE.

Street	$91,220 15
Property	11,031 19
Retain	708 95."

5th. Evidence tending to prove that the defendant disposed of said certificates.

6th. Evidence of notice from the Engineer Commissioner to defendant, as follows:

"*Repairs.*

ENGINEER'S OFFICE, DISTRICT OF COLUMBIA,
WASHINGTON, *July* 8, 1875.

SIR: In accordance with the terms of your contract No. 571 with the Board of Public Works, you are hereby notified that the work done by you under said contract *has become defective from imperfect or improper material or construction, and requires repair.*

If the work of repair be not immediately commenced and satisfactorily completed, it will be done by this office, and the cost of the same will be charged to you.

By order of the Commissioners:

Very respectfully,

R. L. HOXIE,
Lieut. Engineers, U. S. A., Engineer of D. C.

To LEWIS CLEPHANE, esq.,
City."

7th. Evidence tending to prove that R. L. Hoxie was engineer of the District, and as such had charge and control of all work of repair and improving the streets in this city; that his attention was called to the condition of 12th street, from F to N, in the summer of 1875; that portion of the street had originally been paved with wooden blocks by the defendant, *but had become unsuitable for use and travel through the decay of the blocks;* that it required immediate attention and *repair; that by way of repair the blocks were taken up and a new pavement, known as the "Vulcanite concrete pavement," substituted;* that such of the blocks as were sound were used in patching up the street between M and N streets, and lasted until replaced by another and different pavement.

8th. The following letters from R. L. Hoxie, engineer, (page 26:)

"ENGINEER'S OFFICE, DISTRICT OF COLUMBIA,
WASHINGTON, D. C., *August* 16, 1875.

To the Honorable the Commissioners of D. C.:

GENTLEMEN: Referring to my letter of the 9th instant, recommending the repair of Twelfth street N. W., under

section 9 of contract No. 571, I have the honor to state further that the necessary preliminary steps under section 9 have been taken; notice having been sent as per enclosed copy, and no attention has been paid to it.

Very respectfully,

R. L. HOXIE,
Lieut. Engineer, U. S. A., Engineer of D. C."

"ENGINEER'S OFFICE, DISTRICT OF COLUMBIA,
WASHINGTON, D. C., *August* 9, 1875.

To the Honorable the Commissioners of D. C.:

GENTLEMEN: The pavement on Twelfth street, between F and N streets northwest, which was laid by Lewis Clephane, under his contract No. 571, with the late Board of Public Works, is in a fearful condition.

I recommend that under the provisions of section nine of said contract Messrs. Cranford & Hoffman be placed upon the work of repair.

The method in this case to be that indicated by me in my report upon paper No. 3,560, E. O., 1875, viz.: one or more squares of the wood pavement to be taken up and replaced by a concrete, and the sound blocks so obtained to be used in repairing the rest of the street, excepting the space between the curb corners at the intersection of Twelfth and H streets northwest, to be paved by Mr. H. A. Willard with clinker brick on edge at actual cost.

Very respectfully,

R. L. HOXIE,
Lieut. Engineers, U. S. A., Engineer of D. C."

(Indorsements:)

"OFFICE OF THE COMMISSIONERS OF THE
DISTRICT OF COLUMBIA,
WASHINGTON, D. C., *August* 16, 1875.

Respectfully returned—approved.

By order:

WM. TINDALL,
Secretary.

Referred in engineer's office to Mr. Brown—prepare papers."

9th. Evidence of Hoxie that the Commissioners gave him an order to notify the defendant to repair the pavement, but he did not remember whether it was in writing or not.

10th. The contract between the Commissioners and Cranford & Hoffman to *repair* the carriageway of 12th street, between F and N streets, and in the following manner, to wit: *The wood pavement shall be taken up for the distance of one or more squares, as may be directed, and be replaced by Vulcanite concrete pavement,* and the defective places in the remaining part of the wood pavement shall be repaired with the sound blocks of wood so removed, &c., &c., (p. 28.)

11th. The detailed measurement of the work done by Cranford & Hoffman, amounting to $40,517.43, (p. 32.)

12th. The evidence of Hoffman that only a small proportion of the blocks taken up were fit to be relaid, and the same were relaid by him under his contract, for which he received some $1,200, as appeared on the last voucher. That Cranford & Hoffman received payment in full for said work said sum of $40,517.43.

This closed the plaintiff's testimony, and the defendant demurred orally to the evidence, which the court sustained, and directed the jury to find for the defendant, which was done.

PLAINTIFF'S EXCEPTIONS.

The *first* is to the oral demurrer, it claiming that the demurrer should be in writing, so that issue might be taken thereon in writing.

A demurrer to the evidence is simply a request for the court to instruct the jury that upon the whole evidence the plaintiff is not entitled to recover. *This has been the uniform practice of the court during the whole period of its existence.* That it is both lawful and proper is fully settled by (101 U. S., 18,) Bowditch *vs.* Boston, in which the court says, "it gives scientific certainty to the law in its application to the facts and promotes the ends of justice."

The other exceptions are to the court's instructions to the

jury (p. 34), which are evidently not instructions as to the law upon questions of fact submitted to the jury for its decision, *but merely reasons assigned by the court for directing the jury to return a verdict for the defendant.* Hence it is unnecessary to consider the several exceptions to the various points of these "instructions." The only question in the case is, that, assuming all the testimony introduced by the plaintiff to be true, was it entitled under the law to recover from the defendant?

We say it was not so entitled, for the following reasons:

I.

The defendant's contract was not an absolute, unconditional agreement by him to keep the street in repair for three years. His contract was to repair the work if it *should become defective from imperfect or improper material or construction.*

The plaintiff so alleged, and the averment of the breach is that the defendant did not execute the work "*in a good, sufficient, and workmanlike manner*, or *in accordance with the specifications contained in said contract.*" Was any evidence introduced by the plaintiff to prove the truth of the alleged breach of contract by the defendant, or any from which it would have been lawfully competent for the jury to infer the truth thereof? Not a particle. On the contrary, the plaintiff proved by the certificate of its own engineer, under whose supervision the contract provided that the work should be done, that it was "*correct as to quantity and quality, and that the work has been done in conformity with the contract and specifications relating thereto, and that the material and labor has been furnished as specified,*" (p. 24.)

This is absolutely conclusive on the District in the absence of fraud on the part of the engineer, which is not pretended.

4 Otto, 98, Omaha *vs.* Hammond.

We submit that the District government could not, under a conditional contract of this kind, require a street to be paved with a particular kind of material, treated by a prescribed chemical process, under the inspection of its own officers, (all of which, it is conceded and proved by the plaintiff in this case, was honestly and faithfully carried out by the contractor,) *when the material is, in its very nature, inherently defective and unsuitable for the purpose,* after it has manifested its destiny, say to the contractor, true, you put down the material we required you to use and did the work faithfully and well, but it is evident the material was "improper" and ought never to have been used. You were a fool for making such a contract, and we will make you pay the cost of a new payment." It would be a patent fraud upon the contractor. The bare statement of the proposition carries its refutation with it.

We regard this first point so conclusive of the plaintiff's case that we will only briefly refer to other points which we deem also conclusive and a justification of the action of the court.

II.

The consideration for the defendant's contract was that he should be paid in money for the work he did.

The plaintiff so alleges and avers, as was essential, that it did pay the defendant. The only proof upon the subject is that it didn't pay the defendant a single dollar in money, but gave him the certificates of its auditor that it owed him the money; and there is no proof that any of these certificates have ever been paid.

Every plaintiff must allege and prove performance of the requirements of the contract on his part before he can complain of the failure to perform by the other party to the contract.

2 Par. Con., 41, 189.

1 Pet., 455, B'k of Col. *vs.* Hagner.

III.

The contract was that if the defendant failed to *repair*, the other party might *repair* at his (the defendant's) cost. The plaintiff alleges that the defendant did fail to repair, and it repaired the street itself at a cost of over $40,000, for which it sues. What is the proof? It is that it took up a rotten wood pavement and put down in its stead a new vulcanite pavement. That this is not repairing, see 9 Wall. 50, (Chicago *vs.* Sheldon.) A street railway company in Chicago had contracted with the city to keep the street between its tracks *in repair*. The city put down a new pavement and sought to recover from the company the cost of paving between its tracks. This court held that the obligation of the company extended to repairs only, and that it was not liable for a new pavement.

IV.

In respect of the plaintiff's claim that it was entitled to recover the $1,200 paid for repairing the street from M to N with the few good blocks taken up between F and M streets, the objection still holds that there was no proof of improper material or construction, but that, on the contrary, the proof was that the material and construction were proper. The mere fact that in six squares of this wood pavement enough blocks out of the great mass were taken up (presumably from the edge next to the sidewalk, where they had not been subjected to wear from passing vehicles or rot from falling water) with which to patch out the square between M and N, (pp. 25, 26,) which was again replaced by a new and different pavement, was certainly not proof from which the jury could infer that it was possible to have so laid this wood pavement that it would have lasted three years without needing repairs. No direct proof was offered by the District to show that a wood pavement treated as this was required to be, had lasted or would last in good condition for three years.

V.

It is a notorious fact that all wood pavements in this city have become so worthless that they have long since been officially condemned by the District authorities, and have been and are being replaced by other pavements as rapidly as the condition of the finances of the District will permit.

Under this contract the defendant had the right to assume that the Board of Public Works guaranteed that, if the material and construction was as required by the contract, the pavement would last three years without repair. That both parties so supposed is manifest from the fact that the defendant under the express terms of the contract was only to be responsible for "*imperfect or improper material or construction*," meaning necessarily imperfect or improper materials of the kind called for by the contract. The District virtually said to him, the material called for by this contract to be treated and laid as required by the specifications is proper material and construction; if you depart from it and fail to use this material or construct the pavement otherwise than as required, so that it shall become defective in consequence thereof within three years, then you shall repair it; but if you do as required by the contract in respect of material and construction, then this contract does not require you to repair.

The plaintiff on the trial proved by its own engineer that the contract was fully complied with by the defendant in respect of material and construction, but now claims that the very material which the contract required should be used was worthless and improper, and therefore the defendant was bound under his contract to replace the pavement. We submit that in common honesty and common law no such construction can be given to this contract. *The attorney for the District concedes in his brief that the material and construction were such as the contract called for, but that the material required by the contract (burnetized wood) was inhe-*